IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

TUESDAY, THE 23RD JANUARY 2007 / 3RD MAGHA 1928

Crl.Rev.Pet.No. 233 of 2007()

AGAINST THE ORDER IN CRMP.7282/2006 IN
CC.513/1995 of CHIEF JUDL.MAGISTRATE, ERNAKULAM

.....

REVN. PETITIONER: ACCUSED NO.1:

K.G. PREMSHANKER,
FORMER SUPT. OF POLICE, KANNUR, NOW WORKING AS
THE ADDL.DIRECTOR GENERAL OF POLICE,
THIRUVANANTHAPURAM.

BY ADV. SRI.V. GIRI

RESPONDENTS: COMPLAINANT:

INSPECTOR OF POLICE,
CENTRAL BUREAU OF INVESTIGATIONS, SPECIAL POLICE
ESTABLISHMENT, KOCHI, REPRESENTED BY PROSECUTOR,
HIGH COURT OF KERALA AT ERNAKULAM.

BY SC FOR CB1 ADV. SRI.S.SREEKUMAR

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 23/01/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K. HEMA, J.

CRL. R.P. NO.233 of 2007

Dated this the 18th day of January, 2007

O R D E R

The revision petitioner is the first accused. He is charge-sheeted for offences under Sections 323, 342, 357, 427, 465 and 201 of the Indian Penal Code. The allegation against him is that some time in February, 1988, revision petitioner conspired with the other accused, to cause voluntary hurt, wrongful confinement of the de facto complainant and also to cause damage to his office and forge certain documents. The case is pending before the Chief Judicial Magistrate's Court.

2. The petitioner is a senior IPS officer. According to him, he has put in 30 years unblemished service. He is a public servant and he was working as a Superintendent of Police at Kannur, on the date of alleged offence. According to him, he is entitled to the benefit of Section 197 of the Code of Criminal Procedure ('the Code', for short). His case is that he cannot be prosecuted, except with sanction under Section 197 of the Code. It is contended that there is no legally valid sanction in this case to prosecute him and hence he filed a petition before the court of the Chief Judicial Magistrate to stop the proceedings initiated against him, under Section 258 of the Code.

3. Learned Magistrate, after considering the rival contentions, held that the question whether sanction is granted by the Government to prosecute petitioner is sufficient or not, is a matter

to be considered, after recording evidence. It was also observed that inadequacy sanction is not a ground to stop the proceedings by invoking power under Section 258 of the Code. It was held that the question whether petitioner is involved in the offence and entered into a criminal conspiracy are to be discussed, after recording the evidence. The petition filed by the revision petitioner was thus dismissed, and hence this revision.

4. The fact that sanction is required under Section 197 of the Code to prosecute the petitioner is not under dispute. According to prosecution, sanction is obtained from the State Government and it is produced in this revision (vide Annexures 1 and 2) and it is valid. Learned Standing Counsel appearing for the CBI at the very outset contended that the alleged invalidity of the sanction order cannot be made a ground to interfere at this stage of the proceedings but it can be considered only during the trial, as held by the learned Magistrate. Reliance was placed on the decision reported in ***Parkash Singh Badal v. State of Punjab*** **((2007)1 SCC 1).**

5. On going through the above decision, I find that the Supreme Court held therein that there is a distinction between absence of sanction and invalidity of sanction on account of non-application of mind. While the former question can be agitated at the threshold, the latter is a question which has to be raised during the trial, it is held. So, it is clear that the question relating to absence of sanction can be raised at the early stage itself. The question raised by revision petitioner in this case is mainly on absence of sanction from the appropriate authority and not merely on invalidity of sanction due to non-application of mind.

6. According to revision petitioner, he is a member of the All India Service and the appointing authority is the President of India and hence he has to be treated as a person “employed in connection

with the Central Government" and not the State Government. Therefore, his contention is that the State government is not competent to grant sanction under section 197(1)(b) of the code to prosecute petitioner. But, the sanction issued in this case is purported to be granted by State Government and hence it is invalid, it is urged. It is also argued that this is not a mere case of invalidity of sanction for non-application of mind, but there is absence of sanction from the appropriate authority. The sanction if any, issued by an authority which has no power to issue sanction has to be treated as non-est and hence, the prosecution is illegal, appears to be the argument.

7. Learned counsel for petitioner also raised a contention that even if, for argument sake it is admitted that the petitioner is employed in connection with the affairs of the State, a look at the order of sanction (vide Annexures 1 and 2) would show that the sanction order is invalid, since it has been signed by the Secretary of the Home Department. Learned counsel has referred to Article 166 of the Constitution of India, Rules of Business and the details therein with reference to the General Administration Department, Home Department etc. (vide Schedule-II of the Rules of Business of the Government of Kerala - 'Rules of Business', for short) and vehemently contended that the authority which has signed and issued the order is the Secretary to the Home Department, but all establishment matters relating to the members of the All India Services are to be dealt with by the General Administration Department. It was also argued that there is nothing in the Rules of Business to show that the Home Secretary has the authority to sign and issue the orders of sanction.

8. Learned Standing Counsel for respondent-CBI in reply argued that the petitioner was employed at the time of commission

of the alleged offence “in connection with the affairs of the State”, as stated in Section 197(1)(b) of the Code and therefore the authority which can grant sanction is the State Government itself. Learned counsel for the respondent also submitted that the sanction order has been issued by the General Administrative Department, for which there is no Secretary and hence it is the Home Secretary who is the person competent to sign orders of this nature. It is also argued that that the State Government applied its mind and all these facts are revealed from the details in the sanction order themselves. It was also pointed out by him that none of the arguments raised before this court on behalf of the revision petitioner were raised before the trial court.

9. On hearing both sides, I am satisfied that the first question to be decided is whether the petitioner is employed at the time of commission of the alleged offence in connection with the affairs of the State or in connection with the affairs of the Union. This question has to be decided at the threshold itself and not during trial. There will be no rhyme or reason to say that a person who cannot be prosecuted except with previous sanction must stand the whole trial, to obtain a decision whether sanction produced in the case is issued by the competent authority or not. The bar under section 197 is imposed to protect a person from unwanted or undeserving prosecution. Therefore, the question of absence of sanction has to be decided at the earliest stage of trial and not towards the end whether the contention raised is tenable or not.

10. To prove that an accused is prosecuted under a sanction under section 197 of the code, it is not sufficient if an order under the title `sanction' is produced. But such order must have been issued by the appropriate authority which is competent to grant sanction. If the sanction order produced is not issued by such

authority, needless to say, it will be a clear case of absence of sanction. Though learned counsel for petitioner strenuously contended that the petitioner, being an officer in the All India Service, he has to be treated as a person employed in connection with the affairs of the Union, in the absence of any document to establish the same, I cannot accept this argument. I cannot also negative this contention either, on mere surmises, without any evidence. Neither of the parties produced any document to support their respective contentions. Thus, there is no evidence before this court to reach a correct conclusion on this disputed fact which is crucial.

11. Learned Standing Counsel for the C.B.I. Submitted that consent was given by the State Government to the C.B.I for investigating the case against the petitioner. The consent is given under the provisions of the Delhi Special Police Establishment Act and the petitioner had not raised any contention about the competency of the State Government at the appropriate stage. The matter relating to such consent (between the parties) came up for consideration in the decision reported in ***Maniyeri Madhavan v. Sub Inspector of Police and others*** **((1994) 1 SCC 536).** However, it is conceded that the fact whether the petitioner comes under section 197(1)(b) of the Code or not has not been specifically decided in the decision cited above.

12. On hearing both sides, in the nature of the contentions raised, I find that an opportunity is to be granted to both sides to establish the relevant disputed fact. This court is sitting in revision and hence It may not be proper to enter any finding of fact for the first time in revision, especially in the absence of any finding on the relevant aspect by the trial court. The petitioner shall file an application or an additional affidavit and the respondent shall also be

granted an opportunity to raise contentions writing and the matter shall be heard and disposed of afresh by the trial court. There should be a finality to the proceedings and hence it is made clear that the trial court need consider only such contentions as are raised in writing.

13. Learned counsel for the petitioner at this juncture brought to my notice that several petitions were filed by the petitioner to get copies of the statements of the witnesses allegedly recorded under Section 161 of the Code which includes the statement of the person who has granted sanction. Since the statements are not given, it is submitted, that it will prejudice petitioner and this may by itself be a ground of discharge. In reply, learned Standing Counsel for the C.B.I submitted that, to his knowledge, statements are already given. Any way, the trial court will look into this question also and dispose of the matter on merits, after ensuring that the statements of all the witnesses cited by the C.B.I are furnished to petitioner.

In the result, the impugned order is set aside and the matter is remanded to the trial court for fresh consideration and disposal, in the light of the observations made in this order, in accordance with law. Learned Magistrate shall dispose of the matter as expeditiously as possible, and not later than two weeks from the date of receipt of a copy of this order. (The crime is of the year 1988).

This revision petition is allowed.

K.HEMA, JUDGE

vgs.